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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 38

SUN OIL COMPANY,

Petitioner,

v.

DALZELL TOWING COMPANY, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 874

SUN OIL COMPANY,
Petitioner,
v.
DALZELL TOWING COMPANY, INC.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner's statement of facts is not only wholly inadequate but it is misleading.

FACTS

On May 14, 1925, the assistant marine superintendent of Sun Oil Company (petitioner) came to New York from petitioner's main office at Marcus Hook, Pennsylvania, to arrange for the docking of the steamship *Sabine Sun* (using her own propelling power) at Texas Oil Company's plant, Bergen Point, New Jersey. The order for the tugs to assist the steamer to her berth was given to the Dalzell Company (respondent) by petitioner's superintendent on May 14, 1925 (R. 22-3).

The *Sabine Sun* arrived in New York Harbor, anchored off Stapleton and lightered sufficient cargo to reduce her

draft to 24 feet. On the afternoon of May 15 the tug *W. F. Dalzell* came alongside the steamer, which then got under way for Bergen Point, with Bennett, captain of the *W. F. Dalzell,* on the steamer's bridge acting as pilot. The steamer was joined by tug *Dalzellite* off St. George, Staten Island, and proceeded under her own steam through Kill van Kull. When off Port Richmond, the flotilla was joined by tug *Fred B. Dalzell, Jr.,* where the captain of the latter (Fort) went on the steamer's bridge and took charge of her navigation, relieving Captain Bennett as pilot* (R. 23, 26, 58).

There were on the steamer's bridge at this time, in addition to the two tug captains, the steamer's master, her third officer, her quartermaster, and Turnbull, petitioner's assistant marine superintendent. The weather was clear, no wind, tide flood, about one hour before high water (R. 41).

Petitioner's superintendent (Turnbull) and been in New York a number of times before and had ordered tugs from respondent to assist petitioner's steamers to their berths. He had always proceeded on the steamer to destination, and on each occasion a tug captain from one of the assisting tugs had been used as pilot, going on the steamer's bridge and act-

* Captain Bennett was not familiar with nor licensed for the water further on; Captain Fort was licensed for those waters; he had been piloting steamers in and out of Newark Bay for many years. There is no question as to his experience and competency as pilot in the waters where the stranding occurred (R. 41-2). Furthermore, inasmuch as petitioner's steamer was drawing more than any vessel that the pilot had taken into Newark Bay up to that time, on the previous day, the pilot took soundings in the vicinity he was to pilot the steamer and made every effort to obtain the latest information concerning the changes due to blasting and dredging and obstructions on the bottom. He even called upon the U. S. Army Engineers, who were in charge of the blasting and dredging operations, for all the information available (R. 42, 45, 53, 99).

ing as pilot. Petitioner's superintendent "expected" a tug captain to act as pilot on this occasion and accepted the tug captain (Fort) to act in that capacity (R. 33-4, 38, 117).

Upon boarding the steamer, the tug captain (Fort) informed petitioner's superintendent that there was considerable risk in taking a steamer of the size and draft of the *Sabine Sun* into Newark Bay at that particular time, because of the blasting and dredging operations which were going on in the vicinity of Bergen Point, and the absence of reliable charts. Turnbull agreed to take the risk, relying on Captain Fort, who had previously acted for him as pilot (R. 44-6, 59, 99-100).*

The *Sabine Sun* then proceeded under her own steam (using her own propelling power) to Bergen Point and made the usual turn—about 90° to starboard—into Newark Bay with the assistance of the three tugs. While proceeding up the Bay on the usual ranges† about 3:30 P. M., the steamer struck an obstruction on the bottom and remained fast. Cargo was lightered from her forward tanks and she then proceeded to her destination about 6 P. M. (R. 25, 67).

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* Turnbull at first testified that he did not remember any conversation with the pilot (R. 35). Later he denied that he had had any conversation with the pilot having to do with the character of the channel and the dangers and risk to be incurred (R. 36-7). Although the District Court found it unnecessary to pass upon this conversation between the pilot and Turnbull, the language of the opinion indicates that the Court believed that it did take place (R. 101). Furthermore, Turnbull also denied knowledge of the "pilotage clause", but both the Courts below found against him on this issue (R. 103, 119).

† The pilot was using the usual ranges at the time the ship struck, *i. e.*, a gas tank and a street on Staten Island. The pilot since used the same ranges with vessels of the same and greater draft and at the same stage of the tide, without accident (R. 43, 46, 72-3).

Danger of the manœuvre

Petitioner would have the Court believe that this was a simple manœuvre and that the pilot was guilty of negligence (Petition, p. 4). On the contrary, the manœuvre was a difficult task at this particular time, because blasting was going on in the vicinity; there were drills in the way; the channel was not marked, and there were no reliable charts of the vicinity in its then condition. At the time of this accident there was so much work of blasting and dredging going on in the vicinity that the United States Engineers would not vouch for the Government charts. There were no aids to navigation and it was necessary to "use your own" (R. 42, 72-3). The only guide for navigating was the natural ranges on the adjacent land, which the pilot used, to wit: a gas tank and street on Staten Island, the ranges he had used before and since without mishap (R. 42, 47-8, 50). Indeed the ranges used by the pilot on this occasion were the same as those used by petitioner's expert (R. 43, 46, 72-3).

Because of the danger, due to local conditions, before taking the job, the pilot took soundings in the vicinity of Bergen Point, called upon the U. S. Army Engineers and made every effort to obtain the latest information concerning the deepest water in the vicinity and obstructions on the bottom (R. 42, 45, 53, 99). The pilot did his best with what he had, but this accident occurred in spite of his efforts, just as several other steamers, in charge of experienced pilots, had stranded on obstructions in the same vicinity (R. 70-2).

THE CONTRACT BETWEEN THE PARTIES

The contract was oral, and, as usual in cases of this kind, consisted merely of an order telephoned by petitioner's superintendent, and accepted by respondent, to send tugs to assist in berthing the steamer at a certain time and place. It is necessary, therefore, that the full terms of the contract be spelled out from the previous dealings of the parties. Nothing was said about pilotage, but petitioner's assistant marine superintendent (Turnbull) understood that his vessel would proceed under her own propelling power, and that one of the tugboat captains would come up on her bridge and take charge as pilot (R. 33-4, 38). The parties had previously done business on this basis (R. 117).

The pilotage clause, which was a part of the contract between the parties, provided as follows:

"When the captain of any tug furnished to or engaged in the service of assisting *a vessel which is making use of her own propelling power* goes on board said vessel, or any other licensed pilot goes on board said vessel, it is understood and agreed that said tugboat captain or licensed pilot becomes the servant of the owners of the vessel *assisted* in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service and in respect to the handling of such vessel, and neither those furnishing the tugs and/or pilot nor the tugs, their owners, agents or charterers shall be liable for any damage resulting therefrom (Exhibit C; R. 86), 117).

Although it was contended below that the clause was not brought to the attention of petitioner, both of the lower Courts found against petitioner on this question of fact (R. 101-2, 118).

No claim was made by petitioner against respondent, nor was any intimation received by respondent that there would

be any claim of liability against respondent until nearly a year after the accident (R. 60).

Although a survey of the damage to the steamer was held shortly after the accident, no notice of survey was given to respondent, nor was respondent afforded an opportunity of attending upon the survey (R. 60).

District Court Opinion

The District Court made no finding on the question of negligence (R. 104),* holding that the pilot in charge at the time of the accident (second tug captain) was petitioner's servant by the terms of the "pilotage clause", and that if there was any negligence, the "pilotage clause" relieved respondent from liability therefor (R. 101-4).

Circuit Court of Appeals Opinion

The Circuit Court of Appeals found that "the contract between the parties included the pilotage clause as one of its terms" (R. 118).

The Court then referred to *The Syracuse,* 12 Wall. 167, and *The Wash Gray,* 277 U. S. 66, relied upon by petitioner (Petition, p. 6; Brief, p. 13), and pointed out that those cases involved *towage,* whereas the instant case was one of *pilotage,* saying:

"* * * a distinction may well be taken between a towage contract as such and a pilotage contract. When a tug-owner is engaged in towing a dead vessel, he may limit his liability to the value of his tug. It is conceivable (although

* It appears from the Court's opinion, however, that the District Court did not consider that the pilot was negligent (R. 99).

we should not so decide unless constrained by controlling authority) that, having granted the privilege of limited liability, the law forbids a towing company from gaining complete exemption from liability if the tug is at fault. But when the 'assisted vessel' is under her own power and the towing company merely supplies a tug master as a pilot, there is no maritime lien upon the tug for the errors of the pilot (*The Sarnia*, 261 F. 900 (C. C. A. 2)) and no limitation of liability of the tug owner. We can conceive of no reason why the person who merely supplies a pilot should not be able to say to the vessel-owner: 'I will furnish a man believed to be competent but you must assume the risk of his errors'" (R. 120).

Neither court decided whether petitioner's superintendent agreed to take the risk of the manœuvre. (See this brief, p. 3.)

Petitioner now argues that if its superintendent agreed to take the risk on behalf of petitioner, it was without consideration (Petition, p. 3). We can conceive of no better consideration than that testified to by the pilot, viz., "if he (Turnbull) hadn't taken the risk, I would have taken the ship back to anchorage" (R. 46). No navigator is bound to keep on against his judgment in the face of danger.

The Edgar H. Vance, 284 Fed. 56 (C. C. A. 9);
The E. A. Packer, 22 Fed. 668 (S. D. N. Y.).

ARGUMENT

FIRST POINT

THE CONTRACT WAS ONE OF PILOTAGE, NOT TOWAGE

It is apparent that petitioner has confused pilotage and towage. In both the petition and argument repeated references are made to the towage contract and the "contract to tow or transport" (Petition, pp. 4, 5; Argument, pp. 11, 12, 19). This was not a towage contract. There is nothing in the contract, either expressed or implied, that respondent agreed to *tow* petitioner's steamer (*Sabine Sun*). The steamer was under her own steam and "making use of her own propelling power" (R. 41, 44). The contract was to furnish tugs to assist a steamer which was being operated entirely by her own machinery, viz., her master, officers and crew were at their stations, her own propelling power was being used and she was being steered by her own steering apparatus* (R. 33, 38, 117).

Petitioner's steamer was required to have a pilot to direct her navigation through the Kills and to her berth. That pilot could be anybody licensed to pilot in those waters. He might be the ship master (which would be the case if he had a license for the waters), a Sandy Hook pilot, a coast pilot, or any outside tug captain holding a proper license. The "pilotage clause", which was made part of the contract between the parties, merely makes it a condition of the contract that if "the captain of any tug furnished to or engaged in the service of assisting a vessel which is making use of

* The tugs engaged in the service were owned by individuals and respondent was merely their agent. No error was assigned in the Circuit Court of Appeals to the dismissal of the libel as against the tugs, and petitioner does not complain here of that part of the decision below (R. 109-13; Petition, p. 1).

her own propelling power goes on board said vessel, * * *" he "becomes the servant of the owners of the vessel assisted in respect to the giving of orders to any of the tugs furnished to or engaged in the assisting service or in respect to the handling of such vessel, * * *." It is clear that the condition comes into operation *only* when the tug captain "goes on board" the vessel assisted, and when that vessel "is making use of her own propelling power".

The situation is not analogous to and has nothing in common with the cases of *towage* as presented by *The Syracuse*, 12 Wall. 167, *The Wash Gray*, 277 U. S. 66, and other cases referred to by petitioner (Brief, pp. 13-14). In those cases the vessels were *not* being navigated. They were without steam and *not* using their own propelling power— they were entirely under the control of the towing vessel, viz., they were being *towed*. In the instant case petitioner's steamer at no time was being towed. She was at all times using her own propelling power; the tugs were not there to tow, but to assist the steamer as ordered from the steamer's bridge (R. 120).

The difference is vital—entirely different principles are applicable. In one case (towage) the vessel is without motive power and completely under the control of the towing vessel; in the other (pilotage) she is in charge of her own movements and is being *assisted* by tugs when necessary as ordered from the steamer's bridge.

Where a steamer is being *towed* the vessel owner has a maritime lien on the tug for damage sustained as a result of any error or negligence on the part of the tug captain (pilot) in charge.

Sturgis v. *Boyer*, 24 How. 110;
The Express, 52 Fed. 890 (C. C. A. 2);
Central Wharf Towboat Company v. *Furness Withy*, 269 Fed. 950 (C. C. A. 1).

But where a vessel is under her *own steam, i. e.,* using her own propelling power, there is no maritime lien on the tugs for errors of the pilot in charge.

In *The Sarnia,* 261 Fed. 900 (C. C. A. 2) the Court said:

"The tug *Palmer* committed no fault, and when Barrett furnished the *Sarnia* with a pilot in the person of Capt. Slauer, he did not thereby promise a maritime lien on his tug for whatever errors Capt. Slauer might commit while standing on the *Sarnia's* bridge and managing that steamer *with her own steam"* (p. 901).

SECOND POINT

THE PILOTAGE CLAUSE IS VALID

The clause is quoted at page 5 of this brief and will be found also at page 86 of the record. A cursory reading of the clause shows that it does not attempt to evade responsibility for the fault or negligence of the tug, as in the "risk of tow" cases referred to by petitioner (Brief, pp. 13-14). The clause merely makes it a condition of doing business with respondent that if one of the tug captains engaged in the service of assisting a vessel "which is making use of her own propelling power" "goes on board said vessel", he "becomes the servant of the owners of the vessel assisted" in respect to the giving of orders and handling of the vessel. In other words, respondent did not furnish, as such, a pilot to take charge of petitioner's steamer. Indeed, it is not contended by petitioner that its superintendent ordered a pilot—he merely ordered tugs (R. 22, 33-4, 38, 117).

The contract contains no agreement on the part of respondent to furnish a pilot, and the pilotage clause is an express repudiation of any such intent. Respondent

furnished tugs to assist the steamer and by the "pilotage clause" made it clear that it was beyond the scope of the employment of the tug captain to leave his tug and go aboard a steamer using her own propelling power and take charge. However, it was expressly provided that if the captain *did* leave his tug and go aboard the steamer, he became the servant of petitioner in respect to giving orders and handling the steamer.

There is no principle of law which forbids an employer (respondent here) from informing parties with whom it contracts (petitioner here) that its servants are acting beyond the scope of their employment when they assume duties beyond the border of the property owned by respondent, and that its general servants are not its servants for the performance of particular acts, and that if its general servants undertake to perform such particular acts, they become for that purpose the servants of petitioner.

Standard Oil Co. v. *Anderson*, 212 U. S. 215, 220;
Denton v. *Yazoo & Miss. Valley Rld. Company*, decided by this court January 4, 1932, 76 L. E. 209.

The pilotage clause was first passed upon (and upheld) in *The Nonpareil*, 1924 A. M. C. 312 (S. D. N. Y). The Court said:

"All harbor towing in this port of steam vessels with steam up is done on these terms * * *" (p. 318).

The clause has since been upheld in the following cases:

The Wireless No. 1, 290 Fed. 239 (S. D. N. Y.);
The Niels Finsen, 52 F. (2d) 795, (S. D. N. Y.);
The Hagood, 1925 A. M. C. 1646 (E. D. N. Y.);
The Energy-Altamaha, 1926 A. M. C. 917 (S. D. N. Y.);
McGirr's Sons v. *Mutual*, 1927 A. M. C. 382 (S. D. N. Y.);

The Watertown-Oran, 1930 A. M. C. 1523 (S. D. N. Y.);

Lee & Simmons Inc. v. *Peursum,* 1931 A. M. C. 699 (E. D. N. Y.);

Foreign Transport Co. v. *Moran* (Opinion April 4, 1932) (C. C. A. 2), not yet reported.

In the *Pacific Maru,* 8 F. (2d) 166 (S. D. Ga.), a much broader clause was passed upon and upheld, following an admirable discussion of the cases. The Court said:

"So far as is disclosed, the contracts containing such exemptions have worked satisfactorily in the commerce of the country for many years, and this court would be bold indeed to declare such a practice against public policy, in the face of such record and of the inaction of the states and of the Congress. The contract of exemption from liability is valid. There was no need to offer an alternative contract at a different rate. Such requirement would violate the freedom of contract" (p. 173).

Counsel for petitioner rely upon *The Wash Gray* (*Compania de Navegacion* v. *Firemen's Fund Insurance Company*), 277 U. S. 66, and *The Syracuse,* 12 Wall. 167 (Brief, p. 13).

The pilotage clause was not involved in either case. In *The Wash Gray,* the steamship *Freeport Sulphur No. 1* engaged to *tow* a tugboat (*Wash Gray*) from Tampico to Galveston. The contract provided:

"*Freeport Sulphur No. 1* will furnish hawser. All other risk and expense to be borne by the tug. It is understood you will keep sufficient men on board to keep up steam and man the tug's pumps. *S. S. Freeport No. 1* is not responsible in any way for loss or damage to the *Wash Gray*" (p. 73).

During the voyage, the tug (*Wash Gray*) was lost and her owners sued the *Wash Gray's* hull underwriters, who defended on the ground that the contract above quoted dis-

charged them from liability on their policies because it was a fact material to the risk which had not been disclosed. The theory of the underwriters was that the contract exonerated the towing vessel from liability for her own negligence. This Court held that the contract (as drawn) did not release the towing vessel from liability for loss or damage to the *Wash Gray* due to the negligence of the master or crew of the towing vessel.

Concerning the *The Wash Gray,* the Circuit Court of Appeals said in the instant case:

"If the opinion lays down only a rule of construction, it is too clear for argument that it does not apply to the pilotage clause in suit which indubitably expresses the intention to put upon the 'assisted vessel' the risk of the pilot's handling of her. If, on the contrary, the opinion lays down the rule that a towing vessel cannot release herself from liability for negligence, however clearly that intention be expressed in the contract of towage, a distinction may well be taken between a towage contract as such and a pilotage contract" (R. 120).

The Syracuse, 12 Wall. 167, involved a *towage* contract where the boat was towed under a contract whereby the owner of the tug agreed to bear the risks of the navigation, provided the steamboat which furnished the propulsive power was navigated with ordinary care and skill (p. 170). This Court held that the steamboat was not navigated with ordinary care and skill and she was held at fault.

THIRD POINT

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISIONS REFERRED TO BY PETITIONER.

Petitioner would have the Court believe that the "pilotage clause" now before this Court (or a similar clause) has been held invalid by this Court and in various other Circuits, and held valid in the Second and Fifth Circuits (Brief, p. 15). This is not the fact. The pilotage clause, now before this Court, has actually been passed upon only in the cases referred to above under Point II of this brief, and in each case it has been upheld.

In *Calzavaro* v. *Planet S. S. Corp.,* 31 F. (2d) 885 (C. C. A. 4) (Petitioner's Brief, pp. 14, 17), the contract between the parties included a similar clause, but the steamer was *not* under her own propelling power and the clause was *not* passed upon (p. 89).

In *British Columbia* v. *Mylroie,* 259 U. S. 1 (Petitioner's Brief, pp. 14, 16), the parties agreed that the tug would render the barge "reasonable assistance from time to time in any emergency which might arise" and that the tug company "is not to be held liable for any damage which might happen to the said barge, *Bangor,* or its cargo, while in tow or at anchor" (p. 11). This Court held that the clauses of the contract seemed to be in conflict. They were reconciled by holding that the tug was not liable unless she should fail to render reasonable assistance to the tow in an emergency, and it was found that the tug did not render the assistance as required by the contract. This Court said:

"This makes it unnecessary for us to consider the contention on behalf of the barge that the exemption clause is void" (p. 12).

All the other cases referred to in petitioner's brief involve *towage,* viz., vessels *not* using their own propelling power.

As for towage (not involved here) the situation is clearly stated by the Circuit Court of Appeals (R. 119).

FOURTH POINT

THE TUG CAPTAIN (PILOT) WAS THE SERVANT OF THE PETITIONER PURSUANT TO THE TERMS OF THE "PILOTAGE CLAUSE".

Petitioner concedes that there was a contract between the parties and that the pilotage clause is a part of that contract, which provided in part:

"Where the captain of any tug furnished * * * goes on board said vessel * * * it is understood and agreed that said tugboat captain * * * becomes the servant of the owners of the vessel assisted * * *." (Petitioner's Brief, p. 18.)

But petitioner contends that the relationship of master and servant did not exist because petitioner did not "choose" the pilot, and the pilot went on the steamer's bridge "without consulting or being requested by petitioner" and one pilot was substituted for another during the voyage without consulting petitioner (Petition, p. 3, Brief, pp. 18-19).

This contention overlooks, certainly disregards the facts, viz., it was necessary to have one pilot succeed the other, because the first pilot was not familiar with nor licensed for the waters further on (see this brief p. 2). As for choosing the pilot and requesting him to come on board petitioner's steamer, petitioner's assistant marine superintendent (Turnbull) was in full charge of the whole operation and admitted that he "expected" a tug captain to act as pilot and accepted

the tug captain (Fort) to act in that capacity (R. 33-4, 38). Both the District Court and the Circuit Court of Appeals so found (District Court opinion, R. 102; Circuit Court of Appeals opinion, R. 117).

Furthermore, there was no mystery about the matter; there was no reason for consultation as to the pilot, nor was it necessary that petitioner request respondent to send a pilot, nor in the ordinary course of their dealings would petitioner choose the pilot. As the Circuit Court of Appeals said:

> "Nothing was said about pilotage, but Mr. Turnbull (petitioner's superintendent) understood that his vessel would move under her own steam and that one of the tugboat captains would come upon her bridge and take charge as pilot. The parties had previously done business together, * * *" (R. 117).

Although agreeing with the Circuit Court of Appeals that a "person who merely supplies a pilot" can "exempt itself from liability for the negligence" of the pilot so supplied to be the agent of the ship piloted, petitioner contends that this was "not merely a contract to supply a pilot", but "a contract to *move* a vessel with the aid of tugs, * * *" (Petitioner's Brief, p. 19). Not at all! As we have shown under Point I, this was a contract to furnish tugs to *assist* a vessel "making use of her own propelling power" and manned by her own master, officers and crew. As usual under the circumstances, one of the tug captains boarded the steamer and acted as pilot. It was for this reason that the "pilotage clause" was made a part of the contract between the parties, *i. e.*, if petitioner desired to use one of the respondent's tug captains as pilot, it was subject to the terms of the "pilotage clause".

While it is true that the steamer was required to have a pilot to direct her navigation, it was immaterial to respondent

where this pilot was obtained. Petitioner could have employed a Sandy Hook pilot or a coast pilot or any other tug captain licensed for these waters. Many ship masters are licensed for the waters navigated by their vessels and are qualified to take charge of docking and undocking. That the pilot was the captain of one of the assisting tugs does not alter the terms of the contract between the parties whereby he became the servant of the ship owner.

CONCLUSION

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI BE DENIED.

CHAUNCEY I. CLARK,
Counsel for Respondent.

Dated New York, April 30, 1932.